IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-221

JACK NATHAN, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2-6
REASONS FOR GRANTING THE WRIT	6-8
CONCLUSION	9
APPENDIX A	1a-9a
APPENDIX B	10a
APPENDIX C	11a-20a

TABLE OF AUTHORITIES

CASES:

Brooke v. *United States*, 385 F.2d 279 (D.C. Cir. 1967)	7
Perez v. *United States*, 297 F.2d 12 (5th Cir. 1961)	6
Tatum v. *United States*, 190 F.2d 612 (1951)	6
United States v. *Achilli*, 234 F.2d 797 (7th Cir. 1956), *aff'd*, 353 U.S. 373 (1957)	7
United States v. *Clancy*, 276 F.2d 617 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961)	6
United States v. *Mathis*, D.C. Cir. No. 75-1373 (May 18, 1976)	6
United States v. *Schanerman*, 150 F.2d 941 (3d Cir. 1945)	8
United States v. *Segal*, 3d Cir. Nos. 75-1534 and 75-1539 (February 6, 1976)	7, 11a-20a
United States v. *Young*, 464 F.2d 160 (5th Cir. 1972)	6
Womack v. *United States*, 336 F.2d 959 (D.C. Cir. 1964)	6

MISCELLANEOUS AUTHORITIES:

3 Wigmore, *Evidence*, §§ 758, 764 (1970)	8

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OPINIONS BELOW

The opinion of the court of appeals is not yet reported. It is reproduced at Appendix A (pp. 1a-9a, *infra*). No opinion was filed by the district court.

JURISDICTION

The opinion and judgment of the court of appeals were filed on June 16, 1976. A timely petition for rehearing and suggestion for rehearing *en banc* were filed on June 29, 1976, and were denied on August 6, 1976 (Appendix B, p. 10a, *infra*).

QUESTIONS PRESENTED

1. Whether the rule applied in the Second Circuit—that a theory of defense must be "*sufficiently* raised in the evidence" before it warrants a jury instruction at the defendant's request—sufficiently protects a criminal defendant's right to a fair trial as contrasted with the rule in other circuits that requires the giving of a requested instruction unless the record is "wholly devoid" of evidence supporting the theory of defense.

2. Whether petitioner was denied his right to confront the witnesses against him when the trial judge prevented defense counsel from impeaching a prosecution witness by playing to him a tape recording of a portion of a conversation between the witness and the petitioner which conflicted with the witness' sworn testimony.

STATEMENT

Petitioner was convicted, after a trial by jury, on four counts of tax evasion for the years 1967 to 1970 and was sentenced to serve concurrent nine-month prison terms and to pay a total fine of $40,000. A major part of the prosecution's proof related to the allegation that the petitioner had, during the years in question, cashed checks of his family-owned collection agency at leading hotels in New York City which were clients of the agency and had put the funds "right into [his own] pockets." Credit managers of the New York Hilton, Waldorf-Astoria and St. Moritz Hotels testified as prosecution witnesses that they had authorized the cashing of the checks in question, and they were cross-examined as to whether petitioner had used the funds in entertaining them and other business contacts.

Two of the three credit managers acknowledged receiving payments from petitioner. The manager for the Waldorf-Astoria, Joseph Mazzurco, admitted that he received substantial cash payments from petitioner whenever the hotel was given a statement, and he also testified that the giving of such gratuities was a "practice" or "custom" in the collection business (Tr. 153-166).[1] Another credit manager, Leonard J. Groppe (employed by the St. Moritz Hotel) reluctantly admitted that he had received gifts at holidays (Tr. 111-112), but he otherwise denied having received payments from petitioner.

In fact, Groppe had falsely told the Internal Revenue Service, in order to explain certain payments that had been made to him by petitioner, that he had independently done collection work for petitioner. Defense counsel had in his possession a tape recording of a conversation between Groppe and petitioner in which Groppe had admitted that this statement to the Internal Revenue Service "wasn't true." When counsel sought to play the tape recording to Groppe during cross-examination to contradict Groppe's square denial (Tr. 127), the jury was excused at the prosecutor's request, and the court and counsel heard the tape several times. Since only a portion of the conversation was recorded, the trial judge excluded the evidence, stating that he would permit it to be presented only "if during the defendant's case you get this straightened out" (Tr. 135). On subsequent occasions during the trial, when the question was raised again, the trial judge stated that he would require "a proper foundation" if the recording were played during the defense case (Tr. 263), and that he did not see "what rele-

[1] "Tr." refers to the trial transcript.

vance" the taped conversation had to the issues at trial (Tr. 577). Since the defense waived the right to present any evidence, the recording was never played. The jury, however, requested the tape during its deliberations and was told it had never been introduced into evidence (Tr. 734).

Asserting that funds obtained when the checks were cashed had been used for business purposes as Mazzurco had testified, petitioner's counsel requested the trial judge to instruct the jury on this theory of defense. Two instructions in this regard were offered, and the judge denied both on ground that it was a "question of circumstantial evidence which [the jury] can consider" (Tr. 603-604).[2]

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[2] The requested instructions read as follows:

Request No. 10

In order for you to find that Nathan, Nathan & Nathan, Ltd. improperly deducted as expenses on its tax returns for 1967-1970 the corporate checks the defendant cashed at the Waldorf Astoria, New York Hilton, Statler-Hilton and the St. Moritz, and that the defendant should have reported on his individual income tax returns for 1967-1970 the total amount of those checks cashed in those years, as claimed by the Government in Counts 1, 2, 3, and 4 of this indictment, the Government must prove beyond a reasonable doubt that the defendant did in fact receive the cash from those checks, that the defendant did not in fact spend or use said sums of money for the benefit of the corporation, that the defendant derived some individual economic benefit from the cash received, and that the defendant's conduct in this regard was motivated by a specific intent to cheat the Government of taxes.

Request No. 11

There has been evidence that the defendant paid Mr. Mazzurco, the credit manager at the Waldorf Astoria Hotel, which was a client of Nathan, Nathan & Nathan, Ltd. for said client, and that such payments were a common practice by companies engaged in collecting delinquent accounts for the Waldorf Astoria.

Consequently, if you should find that the checks which the defendant cashed at the Waldorf Astoria, New York Hilton, St. Moritz, and Statler-Hilton, were paid out for the purpose of assuring a continued flow of business from his clients, whether in the form of pay-offs, gratuities, or kickbacks, then such payments cannot be considered as additional income to the defendant as charged in Counts 1-4, inclusive, of the indictment because they are deductible as ordinary and necessary expenses notwithstanding their misclassification in the books and records of the corporation as refunds.

In the middle of its deliberations, the jury returned with a question relating to the cashed checks, to which the judge replied by asserting that the prosecution's theory was that petitioner had used the funds "for his own purposes" (Tr. 736). Defense counsel again noted that there was proof that the funds had been used for corporate purposes, but the trial judge refused to correct his instructions (Tr. 739).

The court of appeals rejected the argument that a valid theory of defense had been kept from the jury by asserting that Mazzurco's testimony explained "no more than one-sixth of the cash proceeds obtained by Nathan for the checks" (p. 5a, *infra*). Accordingly, the court concluded, "the defense that the check proceeds were used to pay legitimate business expenses was not *sufficiently* raised in the evidence to require the trial court to instruct the jury on this possible defense" (p. 5a, *infra*; emphasis added). The court ignored Mazzurco's testimony that what had been done for him represented a "practice" or "custom" in the trade, which would have provided a basis for a much larger total of payments.

The court of appeals also rejected the contention based on exclusion of the tape recording on the ground that the recording was only "temporarily excluded . . . pending proper identification of the scope and contents of the tape" (p. 6a, *infra*). The failure to make a "subsequent offer" was said to make the original exclusion "harmless" (p. 7a, *infra*).

REASONS FOR GRANTING THE WRIT

1. The quantitative standard applied to the defense evidence by the Court of Appeals for the Second Circuit in this case conflicts with the standard which has been applied in similar circumstances in the Fifth, Seventh and District of Columbia Circuits. Cases in the latter circuits have recognized that a defendant is entitled to have the jury instructed on a theory of defense "when properly requested by counsel and when the theory is supported by *any* evidence." *United States* v. *Mathis,* D.C. Cir. No. 75-1373 (May 18, 1976) (emphasis added). As the Court of Appeals for the Fifth Circuit, noted in *United States* v. *Young,* 464 F.2d 160, 164 (5th Cir. 1972) quoting from the decision of the District of Columbia Circuit in *Tatum* v. *United States,* 190 F.2d 612, 617 (1951):

> . . . in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility.

Accord, Perez v. *United States,* 297 F.2d 12 (5th Cir. 1961); *United States* v. *Clancy,* 276 F.2d 617 (7th Cir. 1960), *rev'd on other grounds,* 365 U.S. 312 (1961); *Womack* v. *United States,* 336 F.2d 959 (D.C. Cir. 1964); *Brooke* v. *United States,* 385 F.2d 279, 284 (D.C. Cir. 1967).

The only proper basis for refusing to instruct on a theory of defense is when the "record is *wholly devoid* of any evidence in support of the instruction." *United States* v. *Achilli,* 234 F.2d 797, 808 (7th Cir. 1956), *aff'd,* 353 U.S. 373 (1957) (emphasis added). Even on the court of appeals' view of the record—with which we strongly disagree[3]—it cannot be said that it was "wholly devoid" of evidence in support of the defense that the funds from the cashed checks were used to insure a steady flow of clients to petitioner's firm. The unique standard applied by the Second Circuit in this case deprived the defendant of the right to have the jury consider evidence of his innocence. The conflict as to the proper standard among the circuits—which resulted in petitioner's conviction—should be resolved in this case.

2. When the Second Circuit approved of the refusal to permit Groppe to be cross-examined with a tape of a portion of a conversation between the witness and the petitioner, its ruling conflicted with that of the Third Circuit in *United States* v. *Segal,* Nos. 75-1534 and 75-1539, decided February 6, 1976, reprinted as Appendix C hereto. In *Segal,* the Third Circuit recognized that "the right of cross-examination is of constitutional dimension and may not be denied" (p. 16a,

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[3] Apart from Mazzurco's testimony regarding the "practice" and "custom" in the industry and the inference that could be drawn from Groppe's testimony, there was also proof that petitioner's reported "entertainment" expenses averaged only $1300 per year, less than 5 percent of what testimony indicated would be reasonable for a business this size (Tr. 277). This made it most likely that the cash obtained from the checks had been used for business purposes.

infra), and it overruled a trial court's decision preventing the playing of a portion of a tape recording that had not been heard during the direct testimony of a government witness.

In *Segal,* as in this case, the court of appeals viewed the trial court's purpose as being to avoid delays (p. 17a, *infra*), but it disallowed that objective to the extent it conflicted with the telling impeachment that a replay of a witness' own voice might produce (p. 16a, *infra*):

> [I]f a matter has been raised on direct examination, generally cross-examination must be permitted. More over, questioning of the witness which tests his perception, meaning or otherwise tends to discredit him is proper.

It is no ground for limiting the right of cross-examination that only a portion of a document or conversation is available. *See United States* v. *Schanerman,* 150 F.2d 941, 944 (3d Cir. 1945). It is well-settled that "any writing or thing may be used to stimulate and revive a recollection (3 Wigmore, *Evidence* §758 (1970)), and this rule includes a cross-examiner's use of prior inconsistent statements to impeach a hostile witness (*Id.* at §764). As a result of the trial judge's failure to appreciate the extent of petitioner's right to cross-examination, a critical piece of evidence—whether Groppe lied in denying that he had received gratuities from petitioner—was kept from the jury.

CONCLUSION

This case presents two important issues concerning the fair and proper conduct of a criminal trial. These issues have been decided by the Court of Appeals for the Second Circuit contrary to principles enunciated in other courts, bringing great harm to the petitioner. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 964—September Term, 1975.

(Argued March 25, 1976 Decided June 16, 1976.)

Docket No. 75-1421

UNITED STATES OF AMERICA,

Appellee,

v.

JACK NATHAN,

Appellant.

Before:

LUMBARD, OAKES and TIMBERS,

Circuit Judges.

Appeal from a judgment of conviction under 26 U.S.C. § 7201 for evasion of income taxes, entered on December 8, 1975, in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*. Appellant argues that (1) the evidence of willfulness was insufficient; (2) an erroneously excluded tape of a conversation impaired development of a critical theory of the defense; (3) introduction of large charts summarizing portions of the prosecution's evidence without appropriate cautionary instructions was prejudicial error; and (4) participation in the interrogation of witnesses by the trial judge indicated to the jury that the judge held a bias in favor of conviction in this case.

Affirmed.

NATHAN LEWIN, MILLER, CASSIDY, LARROCA & LEWIN, Washington, D.C. (Jamie Gorelick, Miller, Cassidy, Larroca & Lewin, Washington, D.C., on the brief), *for Appellant.*

FRANK H. WOHL, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Alan Levine, Lawrence B. Pedowitz, John C. Sabetta, Assistant United States Attorneys, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

This appeal is from a judgment of conviction entered in the United States District Court for the Southern District of New York, before Dudley B. Bonsal, *Judge.* After a six-day trial, the appellant, Jack Nathan, was found guilty on four counts of evasion of personal income taxes, 26 U.S.C. § 7201,[1] and sentenced to concurrent terms of nine months' imprisonment and a fine of $10,000 on each count.

The tax evasion scheme proved a trial was simple and direct in its conception. The appellant owned and operated a bill collection agency. Nathan, Nathan & Nathan, Ltd., in New York City. The agency business was collection of delinquent customer accounts owed to hotels and other clients. The collection receipts obtained by the agency were deposited in full in the firm's own bank account. A fee of approximately 35 per cent was retained by appellant's agency, and the balance was remitted to the client by a check carried on the firm's books as a "refund." The Government proved at trial that the firm, at appellant's direction, employed two devices to understate

[1] 26 U.S.C. § 7201 provides that:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provide by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

its income[2]: (1) "refund" checks written to clients were carried on the books as expenses, even though in many cases the checks had not been cashed three or more years after they were allegedly mailed to the clients; (2) checks made out to client hotels which were not "refunds," but for which the appellant had received cash from the hotels, were treated as "refund" checks on the agency's books and charged as expenses. By the end of 1970, approximately $50,000 of income had been concealed in stale "refund" checks, and during the period of 1967 through 1970, approximately $36,000 of cash was siphoned out of the agency through Nathan's cashing of putative "refund" checks at the client hotels.

Appellant raises the following claims at this appeal: (1) the evidence that appellant "willfully" evaded payment of his income taxes, *see* note 1 *supra,* was insufficient to warrant submission of the case to the jury; (2) the defense was prejudiced by an erroneous exclusion of a taped conversation tending to show that the proceeds of checks cashed by appellant at client hotels were used to pay "gratuities" to the credit managers at those hotels; (3) use by the Government of charts which summarized portions of the evidence, without appropriate cautionary instructions, was prejudicial error; and (4) participation in the interrogation of witnesses by the trial judge indicated to the jury that the judge was biased in favor of conviction. We reject each of these arguments and affirm the judgment of the trial court.

There is ample evidence of appellant's willful evasion of taxes to support the conviction. An accountant formerly

[2] Since the collection agency was organized as a Subchapter S corporation during the period covered in the indictment, the profits of the firm constituted income to the appellant. 26 U.S.C. § 1373. Therefore, his willful participation in a scheme to understate the agency's profits constitutes evasion of his personal income taxes under 26 U.S.C. § 7201, *see* note 1 *supra.*

employed by appellant, Allan Edwards, testified that he had informed Nathan that the stale "refund" checks should be written off the agency's books and that as an accountant he could not prepare the appellant's tax returns unless the appropriate adjustment were made. Nathan then fired Edwards, allegedly for cause,[3] though the jury could well have believed Edwards was fired because of appellant's desire to conceal his income. A second accountant, Sanford Katz, hired to succeed Edwards, also testified that appellant was aware of the mounting sum of stale "refund" checks carried on the agency's books. From this evidence the jury could well conclude that appellant willfully engaged in conduct which concealed his income. Nathan did not testify and the defense presented no witnesses.

The evidence of willful evasion of taxes with regard to appellant's cashing of "refund" checks at client hotels is equally forceful. These amounted to 100 checks aggregating $36,120 during the tax years in question, 1967-70. The stubs for and the face of these checks looked just like genuine "refund" checks (although the reverse side of the checks carried a different endorsement). Both Edwards and Katz had been led to believe that these checks were "refund" or "client" checks, and appellant never gave contrary instructions, told his accountants that he was obtaining cash for the checks at the client hotels, or made any other entries on the stubs or face of the checks which he generally drew himself. This circumstantial evidence of willful evasion of taxes was sufficient to allow the case to go to the jury. The appellant has argued that the Government failed to show that Nathan did not use the cash proceeds of these checks for business purposes (*i.e.*, "gratuities" and entertainment for client credit

[3] Appellant claims that Edwards was fired because he had failed to prepare Nathan's income tax returns on time and had assigned junior employees to work on the account rather than doing the returns himself.

managers). While "the ultimate burden of persuasion remains with the Government" on the issue whether *net* taxable income was understated by the taxpayer, *United States* v. *Leonard*, 524 F.2d 1076, 1083 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3621 (U.S. May 4, 1976), we agree with Judge Coffin that "[t]he applicable rule here is that uniformly applied in tax evasion cases—that evidence of unexplained receipts shifts to the taxpayers the burden of coming forward with evidence as to the amount of offsetting expenses, if any." *Siravo* v. *United States*, 377 F.2d 469, 473 (1st Cir. 1967).

In this case, moreover, as in *United States* v. *Leonard*, *supra*, the defense that the check proceeds were used to pay legitimate business expenses was not sufficiently raised in the evidence to require the trial court to instruct the jury on this possible defense. The only evidence regarding cash gratuities introduced at trial was from Joseph Mazzurco, the credit manager at the Waldorf Astoria, who admitted receiving between $200 and $500 in cash per year from appellant. No nexus between these payments and the proceeds of the challenged checks appears in the record; even if it did appear, the sums involved fall far short of explaining any material portion of the approximate $9,000 cash per year appellant was obtaining out of agency earnings through the cashing of the bogus "refund" checks. All of the checks were cashed at three New York hotels. Even assuming that each of the credit managers at these hotels were receiving cash "gratuities" of $200 to $500 per year from appellant, this accounts for no more than one-sixth of the cash proceeds obtained by Nathan for the checks. There is not the slightest hint in the record as to a legitimate business usage for the remaining bulk of the cash proceeds of these checks. In these circumstances, it was proper for the trial court to refuse to instruct the jury that if the check proceeds had been wholly paid out for business purposes there was no evasion of income. *See United States* v. *Leonard*, *supra*;

United States v. *Gross*, 286 F.2d 59, 61 (2d Cir.), *cert. denied*, 366 U.S. 935 (1961).

Appellant claims that a taped conversation between appellant and Leonard Groppe, the credit manager at the St. Moritz Hotel, indicating receipt of gratuities by the latter, was improperly excluded. However, the tape was only temporarily excluded during appellant's cross-examination of Groppe pending proper identification of the scope and contents of the tape. It is quite plainly within the trial court's discretion to avoid delays in the trial by requiring counsel who does not have his evidentiary material in workable order to proceed with examination of a witness rather than to bog down the trial by a lengthy, awkward in-court attempt to straighten matters out, here selecting portions of a tape for playback.[4] The defense

[4] When the defense offered the tape in evidence it was unable to identify the portion of the tape it intended to play back. The following colloquy took place at the side bar:

The Court: What's the date of the tape?

Mr. Pender: I have to check it. I have to check it. I have to find out.

The Court: Find out.

(Pause.)

Mr. Bender: 5/21/74.

The Court: And who initiated the call?

Mr. Bender: I think he said that he called.

The Court: But I don't know if that's the one that you have the tape on.

Mr. Bender: I think he said he did.

The Court: You must know who initiated the call.

Mr. Bender: I wish I did. I can find out.

(Pause.)

Mr. Bender: Mr. Nathan says that the witness called him.

[Two portions of the tape were then played.]

The Court: That's what I am looking for. Where is the beginning?

was invited to offer the tape again whenever it had ascertained what portions of what conversations on the tape it sought to have admitted in evidence. The defense's omission to make a subsequent offer deprives it of grounds for attacking the trial court ruling on this appeal. Any error, had there been one, was rendered harmless by the open opportunity to offer the tape once it was properly prepared for use. *See United States* v. *Badalamente*, 507 F.2d 12, 22 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

Appellant objects to the Government's use of two large, "outsized" charts to summarize the evidence concerning the number and amount of the various checks improperly charged against the agency's income. Admission of charts for the purpose of summarizing facts contained in other exhibits was entirely proper. *United States* v. *Silverman*, 449 F.2d 1341, 1346 (2d Cir. 1971), *cert. denied*, 405 U.S.

The Defendant: Excuse me, your Honor, I believe at the end of this we will go open [sic] to the other. I believe so. I haven't played these things——

The Court: You think this is a different conversation?

The Defendant: Yes, sir.

[Tape played.]

The Court: I am trying to get the beginning of the one that you had before. You don't know?

The Defendant: No, I don't know.

The Court: Gentlemen, what I think I am going to do with this thing, I am not going to put this on now. I will let you cross-examine him about the content and if during the defendant's case you get this straightened out, you find out what conversations are what and who originated them and you will want to put them on in the defense case, that will be all right, and if it is necessary to recall the witness we can do that, but I think on the present state I am not going to permit this to be presented to the jury now.

918 (1972).[5] Appellant complains, however, that the trial court failed to instruct the jury that the charts were not themselves evidence and should not be considered as such. At the time the first of the two charts was introduced, however, Judge Bonsal instructed the jury that it was

> merely a chart . . . which contains the information as to these various checks, Exhibits 31 to 145. The checks themselves are in evidence, the chart is merely to help you as a pictorial representation.

This instruction conveyed to the jury the substance of the cautionary instruction required by *Holland* v. *United States,* 348 U.S. 121, 128 (1954), and *United States* v. *Goldberg,* 401 F.2d 644, 647-48 (2d Cir. 1968), *cert. denied,* 393 U.S. 1099 (1969). It is true that while the judge indicated that in his final charge he would again caution the jury as to the limited function of the charts, he inadvertently neglected to do so.[6] But viewing the entire trial as a whole, it is apparent that this inadvertence did not prejudice appellant, a conclusion fortified by the lack of a specific contemporaneous objection at the close of the court's charge. *See* Fed. R. Crim. P. 30; *United States* v. *Bermudez,* 526 F.2d 89, 97 (2d Cir. 1975).

The final argument raised is that Judge Bonsal's participation in the examination of several witnesses betrayed

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[5] Appellant claims that the charts used by the Government were prejudicially large. Their size, three feet by seven and one-half feet, was no greater than necessary to convey the information (dates, amounts, exhibit numbers, etc.) on the 115 checks referred to in GX 336 or the 138 stubs referred to in GX 338, and the type size of less than one inch is plainly proper in the light of the requirement that the jury be able to read it. We take it that juries are not so unsophisticated as to be likely to be misled by the size of a courtroom chart, in any event.

[6] Both sides had requested the charge and Judge Bonsal had indicated that a charge to that effect would be made.

a prejudice favoring conviction which deprived appellant of a fair trial. Appellant has indicated 17 instances where the trial court intervened in the defense's examination of witnesses to ask clarifying questions. The Government has also cited several places in the record where Judge Bonsal raised objections on behalf of the defense, and interrupted or curtailed the Government's examination of witnesses. We are satisfied upon examination of the entire record that Judge Bonsal conducted the trial fairly and impartially.

Judgment affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of August, one thousand nine hundred and seventy-six.

Present: HON. J. EDWARD LUMBARD, HON. JAMES L. OAKES, HON. WILLIAM H. TIMBERS, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK NATHAN,
Defendant-Appellant.

No. 75-1421

A petition for a rehearing having been filed herein by counsel for the appellant, Jack Nathan.

Upon consideration thereof, it is
Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

by: EDWARD J. GUARADO
Senior Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1534
No. 75-1539

UNITED STATES OF AMERICA,
Appellee

v.

MORRIS SEGAL and GEORGE HENRY HURST, JR.
George Henry Hurst, Jr., *Appellant* in 75-1534
Morris Segal, *Appellant* in 75-1539

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Criminal No. 75-85)

Argued February 6, 1976

Before: SIETZ, *Chief Judge,* VAN DUSEN and WEIS, *Circuit Judges.*

Opinion of the Court

(Filed April 7, 1976)

WEIS, *Circuit Judge.*

Defendants were tried jointly and convicted of conspiracy and bribery of a public official in violation of 18 U.S.C. §§ 371 and 201(b)(2), arising out of the payment of money to an Internal Revenue agent to falsify a tax liability. We reverse the conviction and remand for a new trial because the voir dire examination of the jury

panel and the cross examination of the prosecution's witnesses were improperly restricted.

Defendant Segal was a certified public accountant who represented the defendant Hurst during an audit of his tax returns by Internal Revenue Agent Edward Sigmond. During the period from June to December, 1974, Sigmond contacted Segal on a number of occasions. At their first meeting, Segal intimated that he might offer Sigmond a bribe, a matter which the agent reported to the Inspection Service. Thereafter, on visits to Segal's office, Sigmond wore a body recorder. He also recorded a number of telephone conversations with Segal and one with Hurst.

At the trial, Sigmond was the principal government witness. He testified that Segal offered to obtain $20,000.00 from Hurst, of which $15,000.00 would go to the agent in return for submitting a false audit report, and the remaining $5,000.00 would be retained by the C.P.A. In December of 1974, Sigmond received $5,000.00 from Hurst through Segal, with a promise that the remainder would follow. On January 7, 1975, Sigmond telephoned Hurst and recorded the conversation in which Hurst admitted providing the bribe and promised to pay the amount still due. Hurst was arrested the following day and gave a statement to Internal Revenue officials admitting his participation and also implicating Segal.

On appeal, both defendants claim that the voir dire of prospective jurors was unduly limited and that the cross-examination of Sigmond was improperly restricted. Hurst also contends that because a redacted version of his confession presented an erroneous view of his part in the affair, a severance was required.

I

Counsel for the defense submitted proposed voir dire questions designed to supplement the court's inquiries.

Segal's attorney filed suggested questions before the date set for jury selection and Hurst's counsel tendered others after the court had concluded the standard interrogation. The judge began the voir dire by asking each venireman to state his occupation for the preceding five years and that of his spouse or other employed person in the household. Thereafter, general questions were propounded to the panel, including the following:

> "Is or has any member of your immediate family ever been an official or employee of the United States Government?"

Seven members of the panel raised their hands indicating an affirmative answer to this question. The next query was:

> "Are you or have you ever been an official or employee of the United States Government?"

Seven persons indicated an affirmative answer to this question. Twelve of the 31 veniremen answered at least one of these two questions affirmatively.

After addressing further general questions to the panel, the court refused to ask the more specific questions submitted by defendant Segal. Two of these would have inquired whether any member of the panel or his immediate family was employed by the Internal Revenue Service or similar departments of the city or state. Hurst's counsel asked that the prospective jurors, who had indicated employment by the federal government, be asked what specific activities they had in their last employment. That request was also declined.

In federal cases, it is approved procedure for the trial judge to question the veniremen on voir dire. This practice expedites the selection of an impartial jury and prevents the excessively lengthy void dire proceedings which

occur in some jurisdictions. The Bench Book, published under the auspices of The Federal Judicial Center, contains a list of suggested questions and apparently was the source of most of the queries utilized by the judge in this case. While these questions are adequate in most instances, situations do arise where supplemental inquiries should be made.

The trial judge has wide discretion to determine the scope and content of the voir dire. *See United States* v. *Napolcone,* 349 F.2d 350 (3d Cir. 1965); FED. R. CRIM. P. 24(a). But the parties have the right to some surface information about prospective jurors which might furnish the basis for an intelligent exercise of peremptory challenges or motions to strike for cause based on a lack of impartiality. *Ristaino* v. *Ross,* 44 U.S.L.W. 4305, 4308 n.9, (U.S. March 3, 1976); *Kiernan* v. *Van Schaik,* 347 F.2d 775 (3d Cir. 1965). *See also United States* v. *Robinson,* 485 F.2d 1157 (3d Cir. 1973); *United States* v. *Poole,* 450 F.2d 1082 (3d Cir. 1971). *Cf. United States* v. *Wooten,* 518 F.2d 943 (3d Cir. 1975).

Because of the circumstances in this case, the defendants would reasonably need to know whether any member of the panel or any person in his family had ever been employed by the Internal Revenue Service. The possibility of lingering loyalty to the service, friendship of persons still employed there, or knowledge of agency procedures are all factors which counsel would weigh in deciding whether to challenge. Since it was known that a number of veniremen had been employed by the government, the requests by defense counsel were reasonable and should have been honored. As the Court said in *United States* v. *Wood,* 299 U.S. 123, 134 (1936):

> "In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature or circumstances of his employment, or of the relation of the particular governmental

> activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him."

Similarly, past employment by the specific agency prosecuting the case is a matter which should be explored upon a party's request. The refusal to do so requires that a new trial be granted.

II.

Since upon a retrial it is likely that the scope of cross-examination will again become an issue, we shall discuss it at this time.

Agent Sigmond testified about the several conferences and telephone conversations he had with Segal from May to December, 1974. Excerpts from some of the recordings were played for the jurors who were supplied with transcripts of these conversations for use while listening to the tapes. Since some of the recordings, particularly those of all-day conferences, were quite lengthy, some editing was necessary. Obviously, much of the material was inconsequential, and playing all of it would have unduly prolonged the trial and aided no one.

In an effort to keep the trial moving, the judge ruled that on cross-examination defense counsel would not be permitted to replay tapes which had been heard during direct examination. He directed that cross-examination be conducted by use of the transcripts. Defense counsel assert that they wished to replay portions of the tape rather than relying on the transcripts because voice inflections were important.

If in any specific instance this contention should appear to be valid, the court should consider the advisability of allowing replay. In general, however, we cannot find error in the court's suggestion that the transcript be used

in reviewing material which had once been played.[1] The court's policy offered a practical way to eliminate the delays which necessarily accompany the playing of selected excerpts from lengthy and unindexed tapes.

However, the court also prohibited defense counsel from using transcripts or playing parts of a recording which had not been heard during direct examination. This restriction was based on the premise that cross examination should not exceed the scope of direct and that the defendants were free to present the proffered evidence in their own case. We think this limitation unduly narrowed the scope of cross examination and hindered proper presentation of the defense case.

Federal Rule of Evidence 611(b) provides that cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. While the trial court has wide discretion to prevent repetition, harrassment of the witness or production of irrelevant material, the right of cross-examination is of constitutional dimension and may not be denied. *Davis* v. *Alaska,* 415 U.S. 308 (1974). Therefore, if a matter has been raised on direct examination, generally cross-examination must be permitted. Moreover, questioning of the witness which tests his perception, memory, or otherwise tends to discredit him is proper. *Davis* v. *Alaska, supra.*

One of defendants' complaints is directed at an incident which occurred during the cross-examination of Agent Sigmond. He had testified about statements made during a conference with Segal on September 16, 1974. Although Sigmond used a body recorder on that date and

[1] Defendant Hurst was denied the opportunity to replay a recording of a telephone conversation of January 7, 1975. Apparently, the purpose was to show that the beginning of the call had not been recorded. However, on cross-examination that fact was admitted by the agent and we do not think the trial judge erred in refusing to play the recording a second time.

a transcript had been prepared, the tape was not played to the jury during the direct examination. On cross-examination, defense counsel's attempts to use either selected portions of the tape or the transcript for that day were blocked by the court. Counsel for Segal explains in his brief:

> ". . . the meeting of September 16, 1974 and the tape recorded conversations arising thereform became crucial to the defense in their endeavor to show that, in fact, at no time during this meeting did the defendant attempt to or offer to Agent Sigmond a bribe in the form of money or gratuities and that rather, certain conversations recorded on that day indicated that Agent Sigmond was himself attempting to solicit a bribe from the defendant."

Since the court did permit some inquiry about that meeting and restricted counsel only on the use of the recording, it seems that the difficulty centered on the question of what constituted the scope of direct examination. In our view, the scope is to be measured by the subject matter of the direct examination rather than by specific exhibits which are introduced at that time. *See* Federal Rule of Evidence 611(b).

Moreover, the fact that some of the points which defendant sought to explore could have been introduced in the defense case is not determinative. That specific evidence could have been a part of the defense does not preclude its development on cross-examination if the prosecution makes the subject matter part of its direct testimony. *United States* v. *Lewis,* 447 F.2d 134 (2d Cir. 1971).

The ruling of the trial court in this instance was erroneous because it unduly limited cross-examination.[2]

[2] We recognize that the playing of excerpts from tapes can lead to delays during the trial. However, a delay may be obviated through counsel's use of cassettes or tapes prepared in advance

III.

After his arrest, Hurst gave a statement to Internal Revenue officials in which he said that Segal had contacted him about the tax deficiency and had indicated $10,000.00 in cash was needed to pay somebody for reduction of the tax. Thereafter, Mrs. Hurst took $5,000.00 in small bills to Philadelphia where she gave them to Segal's business partner. Hurst's statement was redacted by deleting Segal's name in an effort to avoid the problem presented by *Bruton* v. *United States,* 391 U.S. 123 (1968).

On cross-examination of the I.R.S. official to whom the statement had been given, Hurst's counsel sought to establish entrapment by bringing out the references to Segal. The court sustained Segal's objection to the questions on this point and denied Hurst's motion for severance.

The grant of severance is a matter within the discretion of a trial court and involves the balancing of a number of considerations. Foremost of these is prejudice to the defendant. That, however, should be real, not fanciful. It must be considered together with the desirability of joint trials, particularly those involving a legitimate conspiracy count such as was present here. The circumstances of each case will control the decision.

The references which Hurst's lawyer sought to elicit from the witness were arguably within the scope of *Bruton.* But considering the overwhelming nature of the evidence, mention of Segal's name might have been harmless beyond a reasonable doubt. *See Harrington* v. *California,* 395 U.S. 250 (1969). After listening to Sigmond's tape, the jury was well aware that Segal had acknowledged contacting Hurst in December. Similarly, it is difficult to conceive the existence of any doubt that the

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which contain only the relevant portions of the conversations and are adequately indexed.

$5,000.00 in cash had been delivered to Segal because the recorded conversation between him and Sigmond as they counted the money had been played for the jurors. Nevertheless, the trial judge's conclusion that *Bruton* required editing of Hurst's statement was certainly not incorrect.

The redaction, however, raises another issue. The case at bar is unusual in that the objection to admission of the redacted confession comes not from a co-defendant who would be implicated by hearsay evidence, but from the defendant who gave the statement. He does not assert error in inclusion as a co-defendant usually does but, rather, complains of exclusion. Hurst alleges prejudice because he could not produce evidence which would have been admissible on cross-examination but for Segal's objection based on lack of confrontation.

Essentially, then, Hurst's position is that his case should have been severed because of the restriction on his cross-examination. Again, we are dubious that any actual prejudice exists on the record of the first trial. Hurst wished to bring out his comments that Segal had a part in arranging the bribe. To believe that the jury was not fully aware of this fact, in view of the tape recordings, is to live in a never-never land. While the issue is an interesting one, we do not pass upon it because we have granted a new trial on other grounds.

The motion for severance, if made on retrial, must be decided on the record that is before the trial court at that time. We cannot anticipate what circumstances may exist then. For example, if Hurst should decide to testify on his own behalf, then the question would become moot because Segal could then have the right of cross-examination and the *raison d'être* of *Bruton* would not exist. *Nelson* v. *O'Neil,* 402 U.S. 622 (1971); *Government of Virgin Islands* v. *Ruiz,* 495 F.2d 1175 (3d Cir. 1974). Alternatively, in view of other evidence in the case, Hurst

may decide not to object to the deletions, or Segal may not insist upon redaction at the second trial.

We are not called upon to consider the propriety of alternatives which would obviate the *Bruton* problem; *e.g.*, empanelling two separate juries as was done in *United States* v. *Sidman*, 470 F.2d 1158 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973), or holding a bifureated trial as was done in *United States* v. *Crane*, 499 F.2d 1385 (6th Cir.), *cert. denied*, 419 U.S. 1002 (1974). *See also United States* v. *Rowan*, 518 F.2d 686 (6th Cir.), *cert. denied*, 44 U.S.L.W. 3280 (U.S. Nov. 11, 1976). The propriety of those procedures can be considered if and when they are employed by the district court.[4]

The judgment of the district court will be reversed and a new trial ordered as to both defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.